for an agreement to marry is the giving and receiving by marriage all that is implied in the relationship, entailing mutual obligations, for the failure of which by the act of God either party may refuse to perform. Salinger, J., and Evans, C. J., *dissenting.*

The older view of liability of either party for breach of promise despite the fact of physical disability, finds expression in the famous English case of *Hall v. Wright,* El. Bl. & El. 746, where the defendant was held liable notwithstanding that after the promise, without his default, he was afflicted with "bleeding at the lungs" whereby he was rendered incapable of marrying without peril to his life. For an American case, see *Smith v. Compton,* 67 N. J. L. 548. Since the case of *Hall v. Wright,* there has been a decided change in sentiment in England and America. In *Allen v. Baker,* 86 N. C. 91, the court, repudiating *Hall v. Wright,* say that it proceeds on a theory as to the objects contemplated by the marriage relation which is contrary to the general conception. *Sanders v. Coleman,* 97 Va. 690, laid down the rule as to implied condition of continued health. See also *Gardner v. Arnett,* 21 Ky. L. Rep. 1; *Shackleford v. Hamilton,* 93 Ky. 80; *Grover v. Zook,* 44 Wash. 489. It is well settled that in contracts involving personal services, incapacity of body or mind without default on the part of the performer is an excuse for non-performance. *Robinson v. Davison,* L. R. 6 Ex. 269. With much greater reason does this apply to contracts to marry which are by their very nature peculiarly personal. Common understanding as well as public policy demands that the continuance of health should be an implied condition of the contract. Conditions implied in law are no innovations upon the law of contract as the dissenting judges seem to feel in this case. Sound public policy is the basis for such implied conditions and there is no need of legislative action to effectuate this. The decision in the principal case is no doubt in consonance with the trend of modern cases in this country.

B. P. S.

CARRIAGE OF PASSENGERS—CREATION OF THE RELATION—STANDARD OF DUTY TOWARD INTENDED PASSENGERS.—MISHLER V. CHICAGO, ETC., RY. CO., 111 N. E. (IND.) 460.—The plaintiff boarded defendant's street car while it was running at the rate of 3 or 4 miles an hour. Due to the defective condition of the track, the jolting of the car caused him to be thrown off and injured. *Held,* the duty of the defendant, as to the risks incident to a defective track, is to be treated as identical with its duty toward a passenger generally; and this duty is owed alikè to all persons in its cars intending to become passengers thereon, regardless of the time and place where they boarded the car. Ibach, J., and Shea, J., *dissenting* (in 111 N. E. (Ind.) 944).

The majority opinion contends that the carrier owes the highest degree of practicable care, included in which was the duty of keeping its tracks in repair, to all persons in its cars intending to become passengers; and the mere fact that the contract for passage was not yet consummated by collection of fare or an acceptance by the carrier will not relieve the

latter from liability for injury resulting solely from the neglect of such duty. The minority asserts that if the injured party were not a passenger, the carrier would owe him no duty to care for his safety in the highest degree practicable. 6 Cyc. 536. If the plaintiff were a trespasser, defendant would not be liable for negligence, in the absence of malevolence. If he were a licensee, defendant would be liable only if it knew of the defects. If he were an invitee, the company would be absolutely liable for any injury due to their negligence. The case goes very far in holding him an invitee. While it is true that the company invites the public impliedly, still such invitation is open only at stopping places. *Bricker v. Phila. R. Co.*, 132 Pa. St. 1; *Farley v. Cincinnati R. Co.*, 108 Fed. 14. See also, *Eppendof v. Brooklyn R. Co.*, 69 N. Y. 195. If plaintiff were not a passenger (as both opinions agree), nor a licensee, nor, it is submitted, an invitee, under what duty does the defendant lie toward him? The decision in reality amounts to holding plaintiff a passenger. It is submitted that such a decision goes to great lengths in practically holding one a passenger who boards a car at a place, and in a manner, unauthorized by the railway company.

A. N. H.

CONTRACTS—ANTICIPATORY BREACH—DENIAL OF LIABILITY ON INSURANCE POLICY.—BORGER V. CONN. FIRE INS. CO., 156 PAC. (CAL.) 70.—The policy issued by defendant allowed 90 days for payment in case of dispute as to the extent of liability. Upon immediate denial by defendant of all liability, plaintiff brought suit without waiting for the stipulated period to elapse. *Held,* the suit was premature since such denial did not make the sum due before the 90 days.

California is among the states that recognize the doctrine of anticipatory breach of contract. *Remy v. Olds,* 88 Cal. 537; *Garberino v. Roberts,* 109 Cal. 125, 128. Hence the reason adduced for the decision in the principal case cannot be sustained, inasmuch as it applies equally to all examples of anticipatory breach. Even in jurisdictions, however, which admit the doctrine, a distinction has been sought to be drawn between bilateral and unilateral contracts—especially those involving the payment of a sum of money at a determinate future date, such as notes—on the ground that in the latter the practical reason for allowing the plaintiff to act on the advance repudiation, namely to determine his own conduct, does not exist. Cf. Fuller, C. J., in *Roehm v. Horst,* 178 U. S. 1, 18. On this ground the principal case might well rest were it not for the fact that it proves too much. There is a clear distinction between the effect of the doctrine of anticipatory breach as (1) affording the injured party a defence to further performance of his own obligation, in case of a bilateral contract, and (2) giving him an immediate right of action for defendant's breach, in either unilateral or bilateral contract. Pollock on Contracts (Ed. Williston), 361. The above distinction should logically operate to confine the injured party to his defensive remedy in any case, and in both classes of contracts prevent him from bringing suit until the defendant's obligation was due. But such is not the law. In fact, other states, recognizing anticipatory breach, have not followed California but have